IN THE IOWA SUPREME COURT

No. 16-0287

SUSAN ACKERMAN,

Plaintiff-Appellant,

v.

STATE OF IOWA, IOWA WORKFORCE DEVELOPMENT, TERESA WAHLERT, TERESA HILLARY, and DEVON LEWIS,

Defendants-Appellees.

APPELLEES'/DEFENDANTS' AMENDED APPLICATION FOR FURTHER REVIEW OF A COURT OF APPEALS DECISION FILED MAY 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May 2017, I served this Appellees' Amended Application for Further Review on all other parties to this appeal by EDMS to their respective counsel:

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QUESTION PRESENTED FOR REVIEW

LONGSTANDING IOWA SUPREME COURT PRECEDENT EXTABLISHES THE TORT OF WRONGFUL TERMINATION AS "A NARROW PUBLIC-POLICY EXCEPTION TO THE GENERAL RULE OF AT-WILL EMPLOYMENT." BERRY V. LIBERTY HOLDINGS, INC., 803 N.W.2D 106, 109 (IOWA 2011). THE QUESTION PRESENTED IS, CAN A CONTRACT COVERED, NON AT-WILL PUBLIC EMPLOYEE MAINTAIN A CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY?

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STATEMENT SUPPORTING APPLICATION FOR FURTHER REVIEW

COME NOW Defendants-Appellees State of Iowa, Iowa Workforce Development, Teresa Wahlert, Teresa Hillary, and Devon Lewis (collectively referred to hereinafter as the "State"), pursuant to Iowa Rule of Appellate Procedure 6.1103(1) and apply for further review of the May 3, 2017 decision of the Iowa Court of Appeals in *Susan Ackerman v. State of Iowa*, Sup. Ct. No. 16-0287, and in support of this request, state:

1. This Court should take further review because the Court of Appeals:

a. decided a substantial question of law that has not been, but should be, specifically decided by this Court,

b. made errors of law, and

c. rendered a decision that conflicts with prior published Supreme Court decisions.

2. On May 3, 2017, the Iowa Court of Appeals reversed the district court's order, which dismissed Ms. Ackerman's wrongful termination tort claim on the basis that the wrongful termination tort is an exception to the general rule of at-will employment and because her employment with the State was not at will but rather covered

under the terms of a public collective bargaining agreement, Ms. Ackerman did not fall within the scope of persons who could bring the tort.

3. Because the Court of Appeals' decision decided a substantial question of law that has not been specifically resolved by this Court, rendered a decision that conflicts with prior published Supreme Court decisions, and made errors of law, the State asks the Iowa Supreme Court grant further review in this case.

4. This Court has repeatedly and unequivocally held the wrongful termination tort simply "exists as a narrow exception to the general at-will rule," *Ballalatak v. All Iowa Agriculture Ass'n*, 781 N.W.2d 272, 275 (Iowa 2010), this Court has not specifically addressed whether an employee covered under the terms of a collective bargaining agreement created under Iowa Code chapter 20 or otherwise not an at will employee may raise the tort. *See Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, No. 13-1372, 2014 WL 1884478, at *1 (Iowa May 9, 2014) (not answering the certified question of whether "Iowa law allow[s] a contractual covered employee to bring a claim for wrongful discharge in violation of Iowa public policy, or is the tort available only to at-will employees"). The

Court of Appeals' decision directly conflicts with the express language of *Berry v. Liberty Holdings*, in which this Court stated the wrongful discharge in violation of a public policy tort is "a narrow public-policy exception to the general rule of at-will employment." *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011). The *Berry* Court further held that "an **at-will employee** has a cause of action for wrongful discharge" and that "[t]o prevail on an intentional tort claim of wrongful discharge . . . an **at-will employee** must establish" the necessary elements." *Id.* (emphasis added). In explaining the scope of the tort, this Court could have used terms such as "all employees" if it intended the tort to cover all employees, even "for cause" protected employees; however, this Court specifically confined the scope of the tort to at-will employment – terms the Court of Appeals fully disregarded. *See e.g., Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013) (observing the tort is a "public-policy exception to the general rule of at-will employment"); *Theisen v. Covenant Medical Center, Inc.*, 636 N.W.2d 74, 79 (Iowa 2001) (holding the tort can be used to "defeat the presumption of at-will employment"); *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 352 (Iowa 1989) (noting the Court recognized the

common law claim to protect an employee at-will who "is terminated for reasons contrary to public policy"). This Court in *Berry* and in any other wrongful discharge decision could have expanded the tort but did not. The Court of Appeals decision makes this Court's limiting language superfluous and meaningless and wholly disregards the very purpose of the tort, which this Court identified as "a narrow public-policy exception to the general rule of at-will employment." *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d at 109.

The answer to this question is also of immediate importance as related issues are already being presented to this Court. *See Joseph Walsh v. Teresa Wahlert and State of Iowa*, Sup. Ct. No. 17-0202 (an issue of the appeal being whether a merit system employee covered under Iowa Code chapter 8A, subchapter IV and Iowa's Administrative Procedures Act may bring a wrongful termination cause of action).[1]

5. Further, the Court of Appeals erroneously asserted this Court's "circumscription" of the tort has focused on the types of public policies qualifying for protection as opposed to the types of

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1. Because her position is not excepted from the merit system under Iowa Code section 8A.412, Ackerman is both contract covered and merit system covered.

persons protected, ignoring such cases as *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681 (Iowa 2001) (holding wrongful termination cause of action not available to independent contractors); *Van Baale v. City of Des Moines*, 550 N.W.2d 153 (Iowa 1996) (holding a wrongful termination claim not available to civil service employees covered under chapter 400).

6. Finally, the Court of Appeals impermissibly limited or misapplied *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795 (Iowa 1988) and *Sanford v. Meadows Gold Dairies, Inc.*, 534 N.W.2d 410 (Iowa 1995). The Court of Appeals asserts this Court, in both decisions, "recognized the validity of a wrongful-discharge cause of action by contract employees." Slip Op. p. 13. This is wholly inaccurate. In *Conaway*, this Court explicitly identified the question on appeal as "[t]he Preemption Issue" and this Court's analysis and conclusion is based on preemption. *Conaway v. Webster City Prods. Co.*, 431 N.W.2d at 797-800. Similarly, as pertinent to this matter, the issue in Sanford was decided on the basis of preemption. *Sanford v. Meadows Gold Dairies, Inc.*, 534 N.W.2d at 414. More importantly, if this Court had "recognized the validity of a wrongful-discharge cause of action by contract employees," presumably, this

Court would have acknowledged so by providing the answer in response to the certified question in *Hagen v. Siouxland Obstetrics and Gynecology, P.C.*, 2014 WL 1884478, at *1.[2] Similarly the Eighth certainly would have acknowledged such a significant holding, if it existed, in its decision in *Hagen*. The Court of Appeals improperly expanded and misinterpreted the holdings in those cases to support its decision.

WHEREFORE, Defendants-Appellees State of Iowa, Iowa Workforce Development, Teresa Wahlert, Teresa Hillary, and Devon Lewis respectfully request that the Supreme Court grant their

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2. The Court of Appeals criticizes the Eighth Circuit Court of Appeals for failing to appreciate that in *Conaway* and *Sanford*, this Court "recognized" the tort may be brought by contract employees. Slip Op. p. 13 (discussing *Hagen v. Siouxland Obstetrics and Gynecology, PC*, 799 F.3d 922 (8th Cir. 2015)). In *Hagen*, the Eighth Circuit thoroughly examined Iowa's adjudicatory law on this question and held the tort is a narrow, yet well-recognized exception to the at-will doctrine not available to employees protected from wrongful discharge by employment contract. *Hagen v. Siouxland Obstetrics and Gynecology, PC*, 799 F.3d at 928-31. *Conaway* and *Sanford* were both briefed to the Eighth Circuit and, like this Court, no such holding was discerned from those cases. No court other than the Court of Appeals has read *Conaway* and *Sanford* as standing for the proposition that this Court "recognized" the tort may be brought by contract employees. Even the *Hagen* district court, which ultimately opined the tort should be available to contract employees, did not indicate it believed this Court answered the question in *Conaway* and/or *Sanford*. *Hagen v. Siouxland Obstetrics and Gynecology, PC*, 964 F. Supp. 2d 951, 970 (N.D. Iowa 2013).

Application for Further Review of the decision of the Iowa Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case: Plaintiff Susan Ackerman ("Ms. Ackerman") filed a number of successive multi-count Petitions against the State of Iowa, Iowa Workforce Development, Teresa Wahlert, Teresa Hillary, and Devon Lewis (collectively "State"). The district court granted the State's Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition, dismissing Ms. Ackerman's wrongful discharge in violation of public policy claim. Ms. Ackerman sought interlocutory review, which this Court granted on March 25, 2016.

Statement of the Facts and Course of Proceedings:

This appeal involves purely legal questions. Given the appeal arises from a motion to dismiss, the State accepts the "well-pleaded facts" and those facts of which judicial notice may be taken. *Young v. HealthPort Tech., Inc.*, 877 N.W.2d 124, 127 & n1 (Iowa 2016).

From 2011 through January 11, 2015, Defendant Teresa Wahlert served as the IWD director. (App. p. 1; Third Amend. Pet. p. 1). Until her termination, IWD employed Ms. Ackerman as an administrative law judge in its unemployment insurance appeals bureau. (App. pp. 1-2; Third Amend. Pet. pp. 1-2). Defendants Teresa Hillary and

Devon Lewis were Ms. Ackerman's co-workers. (App. pp. 3-4; Third Amend. Pet. at pp. 3-4). Pursuant to Iowa Code chapter 20, the terms and conditions of Ms. Ackerman's employment with IWD were governed by a collective bargaining agreement ("CBA") between the State and the American Federation of State, County, and Municipal Employees, Council 61 ("AFSCME"). (App. p. 8; Third Amend. Pet. p. 8). On January 30, 2015, IWD terminated Ms. Ackerman. (App. p. 8; Third Amend. Pet. p. 8).[3]

In her wrongful termination claim (*i.e.*, Count VIII of her Third Amended Petition), Ms. Ackerman claims the public policy which implicated is the whistleblower statute found at Iowa Code section 70A.28 and that IWD terminated her for testifying at the Senate Government Oversight Committee. (App. p. 14; Third Amend. Pet. p. 14). In Count I of her Third Amended Petition, Ms. Ackerman raises

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3. In its opinion, the Court of Appeals stated the "State does not argue Ackerman's claim is . . . precluded by any arbitration decision under the CBA." Slip Op. p. 11, n.6. In its opening brief, however, the State noted that at the time of filing "before the district court and in a case captioned and docketed as *AFSCME Iowa Council 61 v. State of Iowa*, Case No. CVCV051735 (Polk County), AFSCME sought to vacate the third-party neutral's arbitration award, which affirmed Ms. Ackerman's termination for just cause, pursuant to Iowa Code section 679A.12. Following the parties' briefing, on January 10, 2017, the district court refused to interfere with the arbitration award and upheld Ms. Ackerman's just cause termination. No appeal was filed from the district court's decision.

a "Violation of Iowa Code § 70A.28." (App. p. 9; Third Amend. Pet. p. 9).

On November 30, 2015, the State filed a Motion to Dismiss Count VIII of Plaintiff's Third Amended Petition. (App. p. 16; Motion to Dismiss). On January 26, 2016, the district court granted the motion. (App. p. 34; Ruling). On February 12, 2016, Ms. Ackerman filed an Application for Interlocutory Appeal. (App. p. 38; App. Interloc.). On March 24, 2016, this Court granted interlocutory review. (App. p. 78; S. Ct. Order).

ARGUMENT

I. THE IOWA COURT OF APPEALS ISSSUED A DECISION THAT CONFLICTS WITH PRIOR IOWA SUPREME COURT PRECEDENT AND COMMITTED ERRORS OF LAW IN HOLDING THE WRONGFUL TERMINATION TORT IS AVAILABLE TO CONTRACT COVERED EMPLOYEES.

This case is not about whether an individual covered under a collective bargaining agreement may file a statutory whistleblower cause of action under Iowa Code section 70A.28. In Count I of her Third Amended Petition, Ms. Ackerman raises a statutory whistleblower claim under section 70A.28, (App. p. 9; Third Amend. Pet. p. 9), and the exclusivity of the CBA's arbitration provisions is not at issue in this appeal.

This case is not about whether an individual may base the "public policy" element of a wrongful termination claim on the alleged violation of a statute that itself provides for an independent cause of action. The exclusivity of section 70A.28 or Chapter 8A is not at issue in this appeal.

This case is not even about whether a contract covered employee who voluntarily challenges her termination under the grievance and arbitration process set forth in a CBA, whose termination is upheld by an Arbitrator's Award, and who unsuccessfully seeks to vacate that Arbitrator's Award under an Iowa Code chapter 679A appeal to district court, can then seek to re-litigate identical claims in the district court. The binding effect of the Arbitrator's Award is not at issue in this appeal.

Instead, this appeal solely concerns whether contract covered public employees fall within the class of individuals who may bring a wrongful discharge tort. While this Court has previously held persons under contract (*i.e.*, independent contractors) and persons with a continued expectation of public employment (*i.e.*, civil service employees) cannot bring the tort, *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681 (Iowa 2001) and *Van Baale v. City of Des Moines*,

550 N.W.2d 153 (Iowa 1996), this Court has never examined the precise issue presented in this appeal; namely, whether a person covered under a collective bargaining agreement authorized under Iowa Code chapter 20 may bring a wrongful termination claim. For reasons to follow, the Court of Appeals erred in holding contract covered employees are not precluded from raising the tort of wrongful termination.

A. Failure to Acknowledge and Misapplication of Iowa Supreme Court Authority.

The Court of Appeals failed to consider and misconstrued binding Supreme Court decisions.

As support for its belief that the wrongful termination tort should be broad in its scope of applicability, the Court of Appeals asserted the Iowa Supreme Court's "circumscription" solely involved the types of public policies that qualify for protection and not the type of individual that may seek recourse. Slip Op. p. 12. While acknowledging in a footnote that *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681 (Iowa 2001) stands for the position that the tort is not available to independent contractors, the Court of Appeals found *Harvey* to be "distinguishable" and "does not control the outcome here." Slip Op. p. 12, n7. Of note, the *Harvey* Court concluded that

unlike an at-will employee, an independent contractor "has contract remedies to enforce all expressed or implied terms of a contract." *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d at 684. Given "[t]erms of any collective bargaining agreement [authorized under chapter 20] may be enforced by a civil action in the district court," Iowa Code section 20.17(5), the Court of Appeals' suggestion Ms. Ackerman's is more akin to an at-will employee than a contractually protected independent contractor is erroneous.

The Court of Appeals further disregarded decades of Supreme Court precedent which clearly and unequivocally identified the wrongful discharge tort as a narrow exception to the at-will doctrine. *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013); *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011); *Ballalatak v. All Iowa Agriculture Ass'n*, 781 N.W.2d 272, 275 (Iowa 2010); *Theisen v. Covenant Medical Center, Inc.*, 636 N.W.2d 74, 79 (Iowa 2001); *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 352 (Iowa 1989). The Court of Appeals suggests the State commits a legal fallacy in its reliance on said authority, suggesting that simply because this Court has identified the tort as a "narrow exception to the at-will doctrine for firings that violation

public policy does not logically foreclose Iowa courts from recognizing a wrongful-discharge tort for contract employees." Slip Op. p. 11.[4] The undersigned respectfully posit that when this Court has for decades repeatedly defined the scope of the tort in the same terms and with the same limitations, the Court of Appeals belief that this Court's use of those terms was anything but purposeful and intentional is simply inappropriate.

More concerning, however, is the Court of Appeals' failure to acknowledge the Supreme Court's constriction of the tort in *Van Baale v. City of Des Moines*, 550 N.W.2d 153 (Iowa 1996). In *Van Baale*, following his termination, a city employee covered under the provisions of chapter 400 sought to bring civil claims against his employer – claims this Court unequivocally characterized as falling within the scope of a wrongful termination tort. *Id.* at 156. Recognizing that in enacting chapter 400, the legislature created a

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4. The Court of Appeals describes the State's position a "fallacy of the inverse;" however, in order to place the State's argument into the boundaries of that fallacy, the Court of Appeals was required to distort and misstate the argument's true premise and misstate the accurate holdings of the aforementioned Supreme Court decisions. The Court of Appeals asserts those cases simply stand for the proposition that "at-will employees may sue for wrongful termination in violation of public policy . . . ." Slip Op. p. 11. To portray the decisions as does the Court of Appeals renders specific words in those opinions superfluous and meaningless.

new right to continued employment . . . that did not exist at common law where public employment was at-will," the Court held the employee could not bring a wrongful termination tort. *Id.*

The Court of Appeals' assertion that this Court has never restricted the class of persons who may raise the wrongful termination tort is not accurate. In *Harvey*, this Court held the tort was not available to independent contractors and the *Van Baale* Court held the tort was not available to civil service employees. Because Ms. Ackerman was also protected under a contract and because Ms. Ackerman also possessed statutory and contractual rights to continued employment under Iowa Code chapter 8A, subchapter IV and chapter 20, this Court should find the tort unavailable to Ms. Ackerman.

Finally, the Court of Appeals misread and misconstrued *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795 (Iowa 1988) and *Sanford v. Meadows Gold Dairies, Inc.*, 534 N.W.2d 410 (Iowa 1995). Specifically, the Court erroneously asserted that within those cases, this Court "recognized the validity of a wrongful-discharge cause of action by contract employees." Slip Op. p. 13. However, *Conaway* and Sanford are preemption cases, holding that federal law

did not preempt state district courts from considering wrongful termination tort claims under the facts and circumstances therein presented – not that such a claim actually exists. *See Conaway v. Webster City Prods. Co.*, 431 N.W.2d at 799-800 (holding the tort is not preempted by section 301 of the federal Labor Management Relations Act); *Sanford v. Meadows Gold Dairies, Inc.*, 534 N.W.2d at 414 (stating "[w]e think preemption does not extend to this dispute because there is no argument concerning the terms of effect of the union contract").

Simply put, the Court of Appeals erred in misapplying *Conaway* and *Sanford* (cases which have no bearing on this issue) and in disregarding *Harvey* and *Van Baale* (cases which limit the scope of allowable persons who may bring the tort).

B. Public Bargaining and Foreign Authority.

An equally troubling aspect of the Court of Appeals' decision is its resort to anti-union bias and rhetoric to support its policy-oriented decision, opining with absolutely no supporting authority whatsoever that "employees subject to a CBA have the same 'compelling need for protection from wrongful discharge' as at-will employees." Slip Op. p. 13. Ms. Ackerman's certified employee organization is AFSCME Iowa

Council 61, which represents 40,000 public employees, including a great number of Judicial Branch employees. *See* http://www.afscmeiowa.org/index.cfm?action=article&articleID=8A114212-A334-44B1-8EDE-1D0263F29D7B (last accessed May 16, 2017). The undersigned respectfully posit that to suggest Iowa's certified public employee organizations provide such little protection for their members from wrongful termination that the members are the functional equivalent of at-will employees shows a fundamental misunderstanding of public bargaining under Iowa law—at least as public bargaining existed prior to the 2017 legislative changes.[5]

Furthermore, as part of its anti-union discussion, the Court of Appeals solely cites to a 1988 Kansas Supreme Court decision – a decision which bears virtually no semblance of similarity with the situation at issue in this case. *See* Slip Op. pp. 12-13 (citing *Coleman v. Safeway Stores*, 752 P.2d 645, 652 (Kan. 1988)). In *Coleman*, the employee worked under a private agreement while Ms. Ackerman's employment was governed by a public collective bargaining agreement entered into under state law (Iowa Code chapter 20).

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5. On February 17, 2017, the Governor signed HF 291, which substantially altered the public bargaining provisions of chapter 20. *See* https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF291.

Coleman v. Safeway Stores, 752 P.2d at 646-47; (App. p. 8; Third Amend. Pet. p. 8). In *Coleman*, the union refused to grieve the employee's termination to arbitration while AFSCME not only arbitrated Ms. Ackerman's termination, but also appealed the Arbitrator's Award to district court. *Coleman v. Safeway Stores*, 752 P.2d at 647; *AFSCME Iowa Council 61 v. State of Iowa*, Case No. CVCV051735 (Polk County). Perhaps most importantly, while it is entirely unclear what provisions were included in the *Coleman* CBA, Iowa law dictated what provisions were required to be included in a public-sector CBA at the time of her termination, *see* Iowa Code section 20.9 (2013), and furthermore, the standard State of Iowa/AFSCME CBA language prohibits management from taking reprisal against a covered employee for engaging in whistleblower conduct. *See* https://das.iowa.gov/sites/default/files/hr/documents/unioncontracts/AFSCME_contract.2015-17.pdf (last accessed on May 16, 2017).

Ultimately, the Court of Appeals reads *Coleman* as support for the proposition that unions are not in the business of "protect[ing] individual workers" and perhaps that is the case in Kansas, but that is not true under Iowa law. Iowa Code section 20.8 delineates a number

of rights that attach to individual covered public workers. *See also* Iowa Code section 20.10 (setting forth a number of prohibited practices which are designed, in part, to protect the rights of public employees). Under Iowa law, while the union may have a certain amount of authority to process grievances, "an employee may still seek judicial enforcement of his contractual rights . . . ." *Norton v. Adair County*, 441 N.W.2d 347, 353 (Iowa 1989). Under Iowa law, certified public employee organizations are obligated to "represent all public employees fairly." Iowa Code section 20.17(1). Furthermore, for those covered public employees who believe the employee organization breached its statutory obligation of fair representation, Iowa law provides for a five-year statute of limitation. *See Norton v. Adair County*, 441 N.W.2d at 355 ("adopt[ing] a five-year period of limitation for actions alleging breach of the fair representation duty"). Simply put, to suggest as did the Court of Appeals that contract covered public employees in the State of Iowa are the functional equivalent of at-will employees is wrong.

CONCLUSION

For the reasons set forth herein, Defendants State of Iowa, Iowa Workforce Development, Teresa Wahlert, Teresa Hillary, and Devon Lewis respectfully requests this Court grant their Application for Further Review and reverse the decision of the Iowa Court of Appeals and affirm the decision of the district court.

CERTIFICATE OF COMPLIANCE

This Application complies with the type-face requirements and type-volume limitation of Iowa Rs App. P. 6.903(1)(d) and 6.903(1)(g) or (2) because this amended application has been prepared in a proportionally spaced typeface using Georgia font in 14-point font size and contains 3,883 words, excluding the parts of the Brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

THOMAS J. MILLER
IOWA ATTORNEY GENERAL

/s/ Matthew Oetker
MATTHEW OETKER
Assistant Attorney General

CERTIFICATE OF FILING

I hereby certify that on the 25th day of May 2017, I filed this Appellees' Amended Application for Further Review with the Clerk of the Iowa Supreme court by EDMS.

THOMAS J. MILLER
IOWA ATTORNEY GENERAL

/s/ Matthew Oetker
MATTHEW OETKER
Assistant Attorney General

IN THE COURT OF APPEALS OF IOWA

No. 16-0287
Filed May 3, 2017

SUSAN ACKERMAN,
Plaintiff-Appellant,

vs.

STATE OF IOWA, IOWA WORKFORCE DEVELOPMENT, TERESA WAHLERT, TERESA HILLARY, and DEVON LEWIS,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

A former administrative law judge challenges the dismissal of her tort claim of wrongful discharge in violation of public policy. **REVERSED AND REMANDED.**

William W. Graham and Wesley T. Graham of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Jeffrey C. Peterzalek, Matthew T. Oetker, and Susan J. Hemminger, Assistant Attorneys General, for appellees.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

alleged misconduct in January 2015.[2] During a suspension of several weeks before the termination of her employment, Ackerman filed suit against the State, alleging, among other things, that her employer retaliated against her after she testified at a hearing before the Iowa Senate Government Oversight Committee about "pressures put on the ALJs . . . to render decisions in favor of employers." *See* Iowa Code § 70A.28(2) (2015) (prohibiting an employer from retaliating against a state employee for disclosing information to a member or employee of the general assembly "if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, [or] an abuse of authority").

On November 18, 2015, Ackerman filed her third amended petition, which contained eight counts, including a claim for wrongful discharge in violation of public policy. The State filed a motion to dismiss the wrongful-discharge count on November 30, arguing that because Ackerman was covered by a CBA, she could not bring a wrongful-discharge claim. In its motion, the State provided a hyperlink to the Iowa Department of Administrative Services website, which published the most up-to-date CBA between the State of Iowa and the American Federation of State, County and Municipal Employees (AFSCME),[3] and asserted the district court could take judicial notice of the document. The State also attached a copy of an AFSCME grievance form Ackerman had filed.

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[2] "Because we are reviewing the grant of a motion to dismiss for failure to state a claim, we accept all well-pleaded facts as true." *Hedlund v. State*, 875 N.W.2d 720, 722 (Iowa 2016).

[3] This CBA referenced on the website became effective on July 1, 2015, nearly six months after Ackerman's termination. Neither party raises this as an issue on appeal.

accompanying attachments" (citation omitted)). The State contests Ackerman's preservation of error on this claim.

Assuming, but not deciding, Ackerman preserved error on her opening contention, we may resolve this appeal without addressing whether the district court could properly take judicial notice of the CBA's contents. In its order dismissing Ackerman's wrongful-discharge claim, the district court did not purport to take judicial notice of the CBA or otherwise delve into the terms of the document. Instead, the district court referred generally to Ackerman's employment being "subject to a collective bargaining agreement, negotiated for her and others in her position." Moreover, at oral argument before our court, counsel for both Ackerman and the State agreed the district court's ruling relied not upon any specific provisions of the CBA but upon the CBA's existence (which was acknowledged in Ackerman's petition) and her status as an employee who could be discharged for "just cause" only (a fact conceded by Ackerman). *See Grimm v. US W. Commc'ns, Inc.*, 644 N.W.2d 8, 12 (Iowa 2002) ("We address issues presented in a motion to dismiss based on facts apparent on the face of the petition or conceded by the plaintiff."). Because the record presents no real controversy between the parties on the judicial-notice issue, we decline to reach its merits. *See Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) ("This court has repeatedly held that it neither has a duty nor the authority to render advisory opinions.").

We focus instead on the headliner question: is the tort of wrongful discharge in violation of public policy available to an individual whose

> The plaintiffs' actions are recognizable state tort claims. They can be resolved without resorting to an interpretation of the [CBA], regardless of the discharge for just cause provision in the agreement. . . . Under this holding, the plaintiffs properly sued in state court without first going through [the grievance and arbitration procedures provided by the CBA].

Id. at 800.

Seven years later, the supreme court again found the FLMRA did not preempt a wrongful-discharge claim. *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410, 414 (Iowa 1995). The court, assuming the viability of Sanford's wrongful-discharge claim, reasoned: "Sanford's retaliatory discharge claim rests on our holdings that public policy is violated when an employee, even an employee at-will, is discharged as a result of seeking workers' compensation benefits," *id.* at 412, and: "[T]here is really no argument concerning the terms or effect of the union contract. The union contract served only as background for the issues here. All controverted issues involved routine state law," *id.* at 414. *Cf. McMichael v. MidAm. Energy Co.*, No. 12-0597, 2012 WL 5356138, at *5 (Iowa Ct. App. Oct. 31, 2012) (finding arbitration decision pursuant to CBA, which determined just cause for termination, did not preclude employee's wrongful-discharge claim because "[r]esolution of the [wrongful-discharge] claim does not require interpretation of any provision of the CBA").

Despite the underlying facts in these preemption cases, the Iowa Supreme Court has never directly decided whether the tort of wrongful discharge is available to an individual employed under a CBA. But following *Sanford*, a federal district court faced the question now before us. *See Beekman v. Nestle Purina Petcare Co.*, 635 F. Supp. 2d 893, 919–21 (N.D. Iowa 2009). Relying on

divided on a preliminary point that was dispositive of the case, it declined to answer the larger question.[5] *Hagen II*, 2014 WL 1884478, at *1.

Without direct guidance, the federal district court predicted the Iowa Supreme Court would hold the tort of wrongful discharge was available to both at-will and contract employees. *Hagen v. Siouxland Obstetrics & Gynecology, P.C.* (*Hagen III*), 23 F. Supp. 3d 991, 1004 (N.D. 2014); *see also Hagen I*, 964 F. Supp. 2d at 969–72. The court cited *Conaway* and *Sanford* and reasoned: "Had the Iowa Supreme Court intended to limit the wrongful discharge tort to at-will employees, it could have avoided the preemption issue and simply held that the plaintiffs could not maintain a wrongful discharge claim as contractual employees. But it did not . . . ." *Hagen I*, 964 F. Supp. 2d at 970. The federal district court also addressed the policy behind the wrongful-discharge tort:

> [T]he purpose . . . is best served by applying the tort to both contractual and at-will employees. . . . Whether an employer's choice to fire an employee violates Iowa's 'communal conscience' is completely independent of whether the fired employee was at-will or contractual. The firing in either case harms 'the entire community'—i.e., the public—which has an interest in discouraging employers from firing employees in violation of Iowa's public policy.

Id. at 971.

The federal circuit court reversed, finding that because the employee had a contractual remedy for wrongful discharge and no statute clearly prohibited his discharge for the conduct at issue, his sole remedy was a breach-of-contract claim. *Hagen v. Siouxland Obstetrics & Gynecology, P.C.* (*Hagen IV*), 799 F.3d 922, 930–31 (8th Cir. 2015). The circuit court did not consider either *Conaway* or

[5] The court was divided on the question whether the employee participated in protected conduct that could be the basis for a wrongful-discharge claim. *Hagen II*, 2014 WL 1884478, at *1.

as an "exception to the employment-at-will doctrine," *see, e.g.*, *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761 (Iowa 2009), and extrapolates from those descriptions that the tort should exist exclusively for at-will employees.[6]

The State's reasoning is flawed. To assume because *Jasper* and its ilk hold at-will employees may sue for wrongful termination in violation of public policy then employees who do not work at will may not sue for wrongful termination in violation of public policy "is to commit the fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q." *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2603 (2014) (Scalia, J., concurring in the judgment); *see also Posen Const., Inc. v. Lee Cty.*, 921 F. Supp. 2d 1350, 1364 (M.D. Fla. 2013) ("The problem with denying the antecedent [P] is that there is a logical disconnect between the antecedent [P] and the consequent [Q] such that the predictive behavior of the consequent [Q] is not accurately linked to the nonoccurrence of the antecedent [P]."). The willingness of the Iowa Supreme Court to carve out a narrow exception to the at-will doctrine for firings that violate public policy does not logically foreclose Iowa courts from recognizing a wrongful-discharge tort for contract employees.

The State asserts the federal circuit court correctly forecast that our supreme court would not recognize a wrongful-discharge tort for contract employees because the exception for at-will employees was "narrowly circumscribed to only those policies clearly defined and well-recognized *to*

[6] The State does not argue Ackerman's claim is preempted by Iowa Code section 70A.28 or precluded by any arbitration decision under the CBA.

> which was never designed to protect individual workers, but to balance the individual against the collective interest.

Coleman v. Safeway Stores, 752 P.2d 645, 652 (Kan. 1988), *disapproved of on other grounds by Gonzalez-Centeno v. N. Cent. Kan. Reg'l Juvenile Det. Facility*, 101 P.3d 1170, 1175 (Kan. 2004). Accordingly, employees subject to a CBA have the same "compelling need for protection from wrongful discharge" as at-will employees.

We are unpersuaded by the circuit court's decision in *Hagen IV*, which failed to recognize either *Conaway* or *Sanford*—cases in which our supreme court recognized the validity of a wrongful-discharge cause of action brought by contract employees.[8] *See Conaway*, 431 N.W.2d at 800 (describing wrongful-discharge claims of individuals employed under a CBA as "recognizable state tort claims"); *see also Sanford*, 534 N.W.2d at 412 (describing wrongful-discharge claim of individual employed under a CBA as "rest[ing] on our holdings that public policy is violated when an employee, even an employee at-will, is discharged as a result of seeking workers' compensation benefits"). Accordingly, we conclude Ackerman's status as an individual employed under a CBA does not prevent her

[8] As Ackerman points out, this finding is consistent with several other jurisdictions that have considered this issue. *See, e.g.*, *Davies v. Am. Airlines, Inc.*, 971 F.2d 463, 468–69 (10th Cir. 1992) (applying Oklahoma law); *Midgett v. Sackett-Chi., Inc.*, 473 N.E.2d 1280, 1283–84 (Ill. 1984); *Coleman*, 752 P.2d at 652; *LePore v. Nat'l Tool & Mfg. Co.*, 557 A.2d 1371, 1372 (N.J. 1989); *Retherford v. AT&T Commc'ns of Mountain States, Inc.*, 844 P.2d 949, 959–60 (Utah 1992); *Smith v. Bates Tech. Coll.*, 991 P.2d 1135, 1141 (Wash. 2000).

IOWA APPELLATE COURTS

State of Iowa Courts

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16-0287	Ackerman v. State

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